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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-

STEVEN C. BURNS,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions and Statutes Involved	5
Statement	5
Reasons for Granting the Writ	15
Conclusion	20
Appendix A—Opinion of the United States Court of Appeals	1a
Judgment of Conviction	17a
Order Denying Petition	19a
Order Denying Motion	20a
Appendix B—Constitution of the United States	21a
Securities Act of 1933 § 17(a); 15 U.S.C. 77q(a)	21a
Securities Act of 1933 § 24, 15 U.S.C. 77x	22a
Federal Criminal Code, 18 U.S.C. § 371	23a
Federal Judicial Code, 28 U.S.C. § 1732(a)	23a

Citations

Cases:

Minker v. United States, 85 F. 2d 425 (3rd Cir. 1936)	17

PAGE

United States v. Geaney, 417 F. 2d 1116 (2nd Cir.), cert. denied sub nom. Russell v. United States, —— U.S. ——, 90 S. Ct. 1276, —— L. Ed. ——, (1969) 17, 18

United States v. Renda, 56 F. 2d 601 (2nd Cir. 1932) 17

CONSTITUTIONAL PROVISIONS:

United States Constitution, Fifth Amendment ... 4, 5, 11, 14, 18

United States Constitution, Sixth Amendment ... 5, 14, 20

STATUTES:

Securities Act of 1933
Section 17(a), 15 U.S.C., § 77q(a) 5
Section 24, 15 U.S.C., § 77x 5

Federal Criminal Code
18 U.S.C., § 371 5

United States Judicial Code
28 U.S.C., § 1732 ..... 5, 16

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Petitioner prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Second Circuit made and entered in the above entitled cause on July 22, 1970.

Opinions Below

The decision in this case by the United States District Court for the Southern District of New York took the form of a judgment upon jury verdict and, accordingly, there is no opinion.

The opinion of the United States Court of Appeals for the Second Circuit has not yet been reported. It has been designated as slip opinion No. 3893.

Certain of the questions raised in this petition were presented to the United States Court of Appeals for the Second Circuit and to this Court in a petition for a writ of mandamus and an application for a stay of trial pending the filing of a petition for certiorari to review the order of the Court of Appeals denying the petition for a writ of mandamus, entitled *Steven C. Burns v. Harold R. Tyler.* The opinion of the Court of Appeals denying the motion is unreported. The decision of this Court denying an application for a stay of trial pending the filing of a petition for certiorari in this Court to review the denial of a writ of mandamus by the Court of Appeals, is unreported. A petition for certiorari was not filed, the denial of a stay having occurred on the eve of trial.

Jurisdiction

The judgment of the United States District Court for the Southern District of New York was made and entered on July 29, 1969. The opinion and judgment of the United States Court of Appeals for the Second Circuit was made and entered on July 22, 1970. Copies of both judgments are appended to this petition in Appendix A at pp. 1a to 18a. A motion for an extension of time to file this petition was made and was duly granted on August 17, 1970 extending that time to and including September 19, 1970.

The jurisdiction of this Court is invoked under Title 28 of the United States Code Section 1254(1) providing for the granting of a writ of certiorari after rendition of a judgment by a Court of Appeals.

Questions Presented

The questions presented which were incorrectly resolved by the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit are:

1. Whether Petitioner can be held to have "knowingly" conspired to violate the law when there is concededly a total lack of evidence of knowledge of one entire element of the "conspiracy" and where Petitioner's knowledge of the other element of the "two-pronged conspiracy" is shown only by reference to inadmissible documents which, even if admissible against Petitioner, fail to show any illegal activity by Petitioner or knowledge of any such activity on the part of others or any acquiescence in or authorization of such activity.

2. Whether the trial court erred in receiving in evidence a document (Government Exhibit 1) under the "business records" exception to the hearsay rule which (1) was not made in the ordinary course of any business; (2) was not made in the course of any business whose business it was to make such record; (3) was not assembled in a regular businesslike way from ordinary business occurrences; (4) was purposely and concededly falsified as part of a tax fraud scheme not part of the alleged conspiracy; (5) concededly contained numerous errors; (6) contained its only entries relating to Petitioner in a separate section admittedly made not in connection with the alleged "business" purposes of the other parts; (7) carried none of the earmarks of a business record or any other tests of reliability or authenticity so as to justify the exception to the hearsay rule, thereby depriving Petitioner of the right to attack

the underlying sources of information; and (8) was devastatingly prejudicial to Petitioner's case;

3. Whether the trial court erred in receiving into evidence, under the "business record" exception to the hearsay rule, a document (Government Exhibit 406) prepared as a summary of other information for the most part not before the Court, not in any way in furtherance of the "conspiratorial" purposes, made after the conclusion of all "conspiratorial" acts; concededly prepared and falsified in furtherance of the tax fraud; and not prepared to serve any purpose of the "conspiracy" but only as an accounting between two of the conspirators.

4. Whether the trial court erred in receiving into evidence these documents to prove the alleged conspiracy against Petitioner where there was no substantial independent non-hearsay evidence adduced to show the existence of the conspiracy or the Petitioner's connection with it.

5. Whether the reception into evidence of the documents and their prejudicial use to show Petitioner's alleged involvement in the "conspiracy" constituted a denial of his right to due process of law.

6. Whether Petitioner has been denied his Constitutional privilege against being compelled to being a witness against himself and his Constitutional guarantee of due process of law provided in Amendment V to the Constitution of the United States by the inference of the Court of Appeals that Petitioner "does not deny" cash inducements to sell stock, an element of the Government's case, when, in fact, he pleaded not guilty to all aspects of the indictment and cross-examined witnesses.

7. Whether evidence of an alleged conversation purporting to show "guilty" knowledge on the part of Petitioner was properly received when it failed to contain any rational connection to the proof of the events charged and which served only as prejudicial innuendo.

8. Whether Petitioner's right to counsel of his own choosing and not to be deprived of his liberty without due process of law were denied to the actual detriment of Petitioner because of the trial court's exclusion of counsel and refusal to sever the trials or explore alternative solutions and the reasons therefor *in camera*.

Constitutional Provisions and Statutes Involved

The Fifth and Sixth Amendments to the United States Constitution and the pertinent portions of Sections 17(a) and 24 of the Securities Act of 1933 (15 U.S.C. 77q(a) and 77x), 18 U.S.C. 371 and 28 U.S.C. 1732 are set forth in Appendix B at pp. 21a-23a.

Statement

Petitioner was convicted after a jury trial pursuant to a judgment entered on July 29, 1969 in the United States District Court for the Southern District of New York. Petitioner appealed the judgment to the United States Court of Appeals for the Second Circuit. On July 22, 1970 that Court affirmed the judgment of the District Court in a decision and judgment made and entered on that day. The indictment charged 17 counts of fraud in the sale of securities under Section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)) and conspiracy to commit such violations (18 U.S.C. 371). Federal jurisdiction was founded

upon the charge of violations of these federal statutes. Petitioner was found guilty on five counts; the other counts were dismissed as to him. Petitioner was subsequently sentenced to four months imprisonment. The sentence was suspended on all but the first count and he is to be placed on probation for two years following the conclusion of his incarceration and was fined $5,000.

The indictment charged and the Government offered evidence at trial to prove that Petitioner and the other defendants and certain co-conspirators not named as defendants conspired to sell shares of Donbar Development Corporation ("Donbar") by fraudulent schemes, untrue statements of material facts and omissions to state material facts and acts and practices which operated as a fraud upon purchasers of Donbar stock. The alleged non-disclosures charged as substantive violations of the anti-fraud provisions, and the alleged agreement not to make such disclosures charged as a violation of the Federal conspiracy statute, involved only two basic premises: one, that secret compensation was being offered and paid to salesmen to sell shares of Donbar stock and two, that the price of Donbar stock was being manipulated and rigged.

The Government consistently referred to and offered evidence that the two alleged non-disclosures and the agreement to make them were but two "prongs" of a single conspiracy.

No evidence was offered at trial to show that Petitioner had any knowledge of or participated in any manner whatsoever in the alleged market rigging. Furthermore, all evidence offered indicates that that aspect of the "conspiracy" had ended before there is any suggestion of any contact with Petitioner Burns. In fact, the portion of the "conspiracy"

in which he is alleged to have participated was commenced only because of the failure of the other. Accordingly, if the Government can be said to have sustained its case, it would only be through proof offered on the question of Petitioner's alleged participation in the sales of shares without disclosing the cash payments.

No proof was offered indicating that Petitioner received any cash payments for any sales of shares or knew of any offers or deliveries of cash payments either to him or any other persons or agreed to any scheme for making of such payments other than the following:

(1) Mark Binstein, one of the central figures in the events charged as violative, but who was not himself charged, testified that he attended a meeting at which Paul M. Kaufman, a defendant, stated that he intended to contact Petitioner and offer him $1.00 for every share purchased by him. This testimony was, as against Petitioner, strictly hearsay which, for the reasons set forth below relating to Government Exhibits 1 and 406, dependent for admissibility on the existence of a conspiracy as to which there was no independent non-hearsay proof. Subsequently, Binstein stated that he had gone to Petitioner's office and delivered certain financial data concerning Donbar to him (which, incidentally, Petitioner had already had in his possession since March of 1963). Binstein never testified with respect to any knowledge by Petitioner of any scheme or any other part of the alleged conspiracy in market rigging or other illegal activity. No testimony was offered by Binstein or anyone to show that Petitioner actually received any cash payment or that, in fact, any cash payment was offered to him or that he knew of any cash payments to anyone.

(2) A document designated Government Exhibit 1 was introduced into evidence over defendants' objections. The document shows various entries including items purporting to show purchases by Petitioner's brokerage firm, S. C. Burns & Co. of shares of stock through another broker-dealer firm not a party in any way to the action. It was a so-called "running sheet" written by Binstein which purported to show transactions in Donbar stock. Concededly the document does not show any payment of any funds to Petitioner but only transactions which were purported to be part of the conspiratorial activities. The document was received into evidence under the "business records" exception to the hearsay rule. Purportedly the document was a business record kept in the ordinary course of a business whose business it was to make and keep such a record. However, the evidence clearly indicates that the only "business," of which this could have been a "record," was the business of the alleged conspiracy. Petitioner contends that the document should not have been admitted to prove the existence of a conspiracy as against Petitioner Burns when, in fact, the only purported justification for its admission was that it was the business record of a conspiracy. Secondly, it should not have been admitted against Petitioner to show his involvement in the conspiracy since, again, the only basis for admissibility was the existence of a conspiracy which it was offered to prove. No non-hearsay evidence, independent of such documents, connecting Petitioner to the scheme was adduced to lay a foundation for their introduction against him. Thirdly, the document concededly contained errors and mistaken entries particularly with regard to the entries offered against Petitioner. It was covered with entries, notes and jottings which were unexplained and which had no explained bearing on the

meaning of the document. It was gathered from a number of random sources by Binstein which sources were not established to have been "conspiratorial" or accurate. It was kept, in large part, as a record, if it could have been described as such, of a wholly separate conspiracy in which Petitioner had absolutely no part and of which he was absolutely unaware and which was not charged to anyone, that is, a tax fraud scheme engaged in by others of the defendants and other persons. Accordingly, many of the entries were deliberately falsified and the entire test of reliability and routineness of record keeping, on which the business records exception to the hearsay rule bases its justification for denying the right to cross-examination of the underlying evidence, is wholly lacking.

(3) A document designated Government Exhibit 406, a summary sheet prepared after all of the alleged overt acts in the alleged conspiracy, and certainly after any alleged participation in the conspiracy on the part of Petitioner, purports to be a summary of payments made by Mr. Braun, the accountant for the individuals selling the shares of Donbar stock, for the purpose of promoting the tax cheating scheme mentioned above. The document received in evidence was not alleged to have served in the "conspiratorial" scheme but only as an accounting between two of the other purported conspirators for their own tax cheating purposes. Government Exhibit 406 purports to show payments to various "salesmen" for sales of shares of Donbar stock. It conflicts materially with Government Exhibit 1 and with Binstein's testimony under which Government Exhibit 1 was offered on the meaning of the entries regarding Petitioner. The information contained therein was not gathered in the business of any "conspir-

acy" and it was certainly not in the business of the "conspiracy" to make such a "record." Again, the tax-cheating aspect of the document totally emasculates its reliability. The source of the information contained therein was established at trial to have come only from one of two sources, either Binstein or Daniel Kroll, the principal alleged conspirator who was deceased at the time of the trial. Since Binstein testified that he never saw anyone pay any money to Petitioner or saw him receive any money, the underlying source of the information then must be either hearsay, speculation, deliberate falsification or statements of a deceased person. Likewise, no independent non-hearsay foundation connecting Petitioner to the scheme was laid for its admission against him.

(4) Binstein testified that he met Petitioner in Madison Square Garden four years after the events charged as violative, at a time both knew that the Government was investigating the Donbar case. Burns mentioned that he thought Binstein had nothing to worry about in the then ongoing investigation since Kroll was dead and suggested Binstein keep his mouth shut. Government counsel presented this as evidence of Petitioner's guilty mind. The realm of speculation as to what such a remark might mean is vast and the implication that Petitioner bore a sense of guilt is no more likely than the alternatives. Since no further evidence whether in the form of additional testimony from Binstein on the point or from any other source to show its meaning was offered, the testimony should have been rejected as wholly irrelevant and without connection to the issues of the case. The Court of Appeals failed to deal with the question; yet the prejudicial effect on the minds of the jurors must be regarded as having been grave.

Accordingly, the only proof ever offered related to the alleged cash payments and that was accomplished by resort to evidence entirely tainted and entirely beyond the permissible boundaries of the rules of evidence.

Petitioner contends that the Government failed to meet the burdens of its own theory of the conspiracy, namely the "two pronged" theory, by failing to establish any evidence with respect to knowledge on his part or participation by him in the market rigging aspect. Not only is this so, but the above analysis of the evidence also establishes the Government's failure to sustain even the first "prong" of its theory of the conspiracy, that is, that the Petitioner received cash payments and failed to disclose the same.

The Court of Appeals asserted in its opinion that Petitioner "does not deny" that he was to receive the cash payments. Most assuredly he does deny that and did so when he pleaded not guilty to the indictment. The burden of proof is clearly with the Government to prove beyond a reasonable doubt its contentions on this and all other points in its case, a burden which, for the reasons stated above, it failed to meet. What the Court of Appeals seems to imply is that, by the Petitioner's failure to take the witness stand on this point, he may be deemed to have admitted it, an implication giving rise to a denial of his right to his Fifth Amendment privilege against self-incrimination. There can be no such shifting of burden of proof. The Government has an absolute burden of proof beyond a reasonable doubt and no silence on the part of a defendant can shift that burden. Counsel for Petitioner in its brief assumed *arguendo* on two points that cash payments were received. It did so firstly on the question of the "two-prong" theory, to show that, assuming proof of such pay-

ments, the conspiracy is still not shown and secondly, on the point of whether it would be necessary, again assuming such proof, to disclose the payment to avoid violation of the fraud statute. Such *arguendo* assumptions are a common device employed by counsel and serve useful illustrative purposes and, by no means, can be held to constitute admissions on the part of a defendant or to shift the burden of proof to him.

A separate and distinct Constitutional question, but by no means less important, is raised by the District Court's refusal to allow Petitioner to proceed to trial with counsel of his choosing. A pre-trial motion was made by counsel for Alan Seigenfeld, a defendant who was acquitted, to disallow the representation of Petitioner by Wofsey, Certilman & Haft, Petitioner's long-standing counsel who again represent him in this Petition. The reason for the claim of disqualification was that a partner of the firm had earlier represented Mr. Seigenfeld, as an accommodation for a regular client, for a short period of time, in connection with the Grand Jury investigation leading to the indictment in this cause. Motions were made by both Petitioner and defendant Seigenfeld to sever either of them from trial with the other and the motions were denied. The granting of either of these motions would have obviated the necessity for disallowing Petitioner's counsel. In defense of Mr. Seigenfeld's motion to disqualify Petitioner's counsel, Petitioner requested that Seigenfeld show or at least positively allege that a conflict of interest existed or that confidences were made to the firm by him which might be breached in representing the Petitioner. Partners of the firm filed affidavits with the Court indicating that there

were no confidences of any nature having anything to do with this case which could be breached in the firm's representation of Petitioner. It was suggested that the matter of the showing of such confidences or the danger of their breach might be dealt with the Court *in camera*. The Court rejected these suggestions and decided to protect Mr. Seigenfeld from the alleged potential danger of having an attorney, who had earlier represented him, breach supposed confidences (no such danger having been shown or even alleged except in hypothetical terms), denying the Petitioner the right to be represented by counsel of his own choosing.

Shortly following the indictment in July 1968, counsel for Seigenfeld informally suggested the possibility of a conflict at that time. Shortly thereafter, he again raised the possibility in oral argument on a pre-trial motion. Petioner and his counsel consistently took the view that there was no factual basis upon which to conclude that such a conflict existed. On neither occasion nor at any time thereafter until he made his formal motion for disqualification a short time before the first scheduled trial date, did Seigenfeld actually seek disqualification.

The impact of the Court's direction denied the Petitioner the services of his regular counsel, which had represented Petitioner for a number of years prior to this case, had represented him during the entire investigation and engaged in extensive preparation for the case since the indictment was presented in July, 1968. The actual trial commenced in May of 1969, and the first motion by Seigenfeld for this relief was not made until late in March of 1969. At that point, Petitioner was summarily ordered to get new counsel and required to proceed first in April and then finally on May 5, 1969. Despite the fact that the de-

fendant had expended great care in early preparation for trial, he was denied the benefit to be reaped thusly since new counsel had to confront the complicated issues and enormous quantity of material anew. The Petitioner was denied the substantial right of counsel of his choosing and forced to employ new counsel with hasty preparation to protect the illusory and theoretical rights of Mr. Seigenfeld who had so long delayed the assertion of the conflict. The record would suggest that these actions by Mr. Seigenfeld were a strategem to gain a severence, a motion for which was then pending. In view of the grave constitutional questions created by this order, Petitioner at that time immediately asked the Court of Appeals for an order mandating Judge Tyler of the District Court to rescind his earlier order. The Court of Appeals declined to do so. A motion for a stay of the trial pending the filing of a petition for certiorari to this Court was denied by the Court of Appeals for the Second Circuit, as well as by this Court. Since the denial of the stay occurred on May 2, 1969 (a Friday), and the trial commenced on May 5, 1969, a petition for certiorari was not then filed.

These actions have permitted the right of Petitioner to be represented by counsel of his own choosing guaranteed to him by the Sixth Amendment of the United States Constitution to be abridged without valid reason and to protect only a hypothetical and seriously questioned right of another defendant without examining the validity of the other defendant's claim.

The result of this denial, as well as the other issues presented in this petition, denied Petitioner his rights guaranteed pursuant to the Fifth Amendment of the United States Constitution.

Reasons for Granting the Writ

This case presents to this Court a number of critical issues either never previously resolved by the Court or resolved in Courts below at variance with the decisions below by the Court of Appeals for the Second Circuit or other circuits. It also presents questions on the admissibility of evidence in a criminal conspiracy case which vary so widely from the common and accepted practice of the federal courts as to constitute a denial of due process of law to the Petitioner herein and to require the supervision of that practice by this Court.

Many of these questions deal with the manner in which conviction was obtained against Petitioner on the conspiracy count and, derivatively, the substantive count as well.

By far the most damaging evidence of the alleged conspiracy as regards Petitioner's entry into and participation in that alleged conspiracy, was contained in two documents. Obviously, since there was no evidence of Petitioner Burns having prepared or even seen those documents at any time anytime near the events charged and since they were offered for the truth of the entries contained therein, they were hearsay as to him.

The Court of Appeals ruled with respect to the two documents, Government Exhibits 1 and 406, that they were "business records" of the "conspiracy" (Appendix A at pp. 10a to 12a), and were properly received as an exception to the general exclusionary rule.

The Court did not attend to lengthy arguments presented to it that the documents in question bore none of the hall-

marks of a business record, that it was not the business of anyone to keep such records, that they were inconsistent and confusing, particularly with respect to the entries concerning Petitioner, that the entries on Government Exhibit 1 relating to Petitioner were in a separate category from others made at a different time, that there were conceded inaccuracies, that they were deliberately falsified, that they were gathered from random, unidentified or, perhaps, from a deceased conspirator and that they bore none of the rationale for admission as a "business record." The justification of that exception grows out of the presumed reliability of such records. Subparagraph (b) of Title 28 U.S.C.A. §1732, the "Federal Shop-Book Rule", codifying the common law rule, states that considerations other than the basic ones of keeping the record in the ordinary course of a business whose business it was to keep such record (which by no means, may be assumed to have been met here), go only to the weight, not the admissibility, of the document. Numerous cases have modified this to permit a trial judge in a criminal case to entirely exclude documents, although they meet the preliminary test, if it is found that their admission would unjustly contravene the right of a criminal defendant to examine and confront the sources of such information.

The documents were admitted as against Petitioner under the exception to the hearsay rule allowing statements of one co-conspirator concerning the conspiracy to be admitted as against all conspirators as well as a "business record" of the conspiracy. In any event, they depend for their admissibility on the existence of the conspiracy. In this cause they also were offered to establish the existence of the conspiracy. It is clear that, in a case of this sort, before such

an introduction of evidence against any single "conspirator" may be had, there is a "threshold test" to be met in establishing both (a) the existence of the conspiracy and (b) the particular defendant's joining therein. In *Minker* v. *United States*, 85 F. 2d 425, 427 (3rd Cir. 1936), the Court held that a journal containing entries of purported sales of non tax-paid distilled spirits, prepared by an accountant for some of the members of the "syndicate", "should not have been admitted in evidence *until such time as a conspiracy involving the appellant as a coconspirator was in fact proved.*" (Emphasis added.)

A more current and more complete exposition of the problem of admission of documents and other hearsay statements in trials of indictments of this type is set forth in *United States* v. *Geaney*, 417 F. 2d 1116, 1119-1120 (2nd Cir.), cert. denied *sub nom. Russell* v. *United States*, —— U.S. ——, 90 S. Ct. 1276, —— L. Ed. ——, (1969). That decision sets forth at length the background and justifications of the exception to the exclusionary rule and discusses the necessity for and degree of independent proof required to meet the "threshhold test", citing with approval the following language from *United States* v. *Renda*, 56 F. 2d 601, 602 (2nd Cir. 1932), as follows:

> "The declarations of one party to a concerted mutual venture are admitted against the rest on the notion that they are acts in its execution. (Citations omitted.) Insofar as they are such, they are authorized by all, and are treated as their admission. However, obviously the declaration cannot prove the authority any more than that of an agent. The party to be implicated must be shown independently to be in fact a party to the venture; else there is no authority to act for him."

These decisions set certain standards for admission of such evidence, none of which were met here. There is no showing of any such independent examination of the "threshold" question. The documents were admitted over Petitioner's and other Defendants' objections "subject to connection" but no such connection was ever shown. In fact, the Court of Appeals opinion seems to find the basis for the admissibility of the documents in the existence of the conspiracy and the existence of the conspiracy in the contents of the documents, exactly the situation proscribed by the above and other cases.

Assuming that the trial judge was satisfied preliminarily of this threshold question, the reasonableness of that finding is still to be reviewed. *U.S.* v. *Geaney, supra.* That finding must arise out of independent, non-hearsay evidence. That test was clearly not met on the case at bar. The only such evidence was the conversation indicating that one of the co-conspirators, Kaufman, intended to approach Petitioner on the question of the sales of shares, and the Madison Square Garden conversation between Petitioner and Binstein. Neither or both of these, without reference to the documents, give rise to anything but the barest suspicion and is no proof of any activity, agreement or knowledge by Petitioner.

Another compelling issue raised by the Petitioner is the conclusion of the Court of Appeals (Appendix A at p. 6a), which states that Petitioner did not deny the receipt of the cash payments. The inference, apparently, is that the facts must therefore be deemed admitted. The cases in absolute contradiction of such a proposition stem from the privilege against self-incrimination provided to a defendant in a criminal case under the Fifth Amendment to

the United States Constitution. The Government has, with respect to every fact and circumstance, charged in an indictment, the absolute burden of proof beyond a reasonable doubt. Petitioner did not take the stand in this case and did not directly controvert the assertions of such payments as made in the exhibits described above and in the testimony of Mr. Binstein described above. He pleaded not guilty to the indictment and cross-examined the witnesses and objected to the introduction of the documents. As there was no party other than himself who could conceivably establish the negative in question, i.e., that he did not receive cash payments from anyone, he accordingly denied it in every way available to him other than his personal testimony. The evidence introduced on this point, for all of the reasons stated above was not established except by inadmissible documents.

The implications of the Court's inference are, of course, extremely grave; if found to be erroneous, it requires reversal.

The remaining issue presented to the Court is the denial to Petitioner of his right to counsel of his choice. The facts surrounding this denial are all set forth in the statement above and it remains to be said here that such denial was done summarily leaving little time for preparation of new counsel, was based on a possible hypothetical right of another defendant who was subsequently acquitted, without even the allegation of a basis for a conflict of interest after that defendant had delayed many months in asserting that right, and was done without proper exploration of the reasons therefore or exploration of alternatives such as severance of one or the other defendants involved. It resulted in a severe and actual denial of Petitioner's rights in order to protect Mr. Seigenfeld who had long delayed his

motion to disqualify Petitioner's counsel. Petitioner does not contend that the Sixth Amendment affords him an absolute and unlimited right to counsel of his own choosing; Petitioner contends that the denial as carried out in the manner it was, severely affected his ability to present a defense, thereby abridging his substantial Constitutional right.

CONCLUSION

For the foregoing reasons, it is respectfully submitted:

1. This petition for a writ of certiorari should be granted.

2. This case should be set down for argument at the earliest practicable date.

Respectfully submitted,

CHARLES SNOW
Counsel for Petitioner

EARL J. WOFSEY
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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 564-7—September Term, 1969.

(Argued March 18, 1970 Decided July 22, 1970.)

Docket Nos. 33979, 33980, 34004, 34348

UNITED STATES OF AMERICA,

Appellee.

—v.—

PAUL M. KAUFMAN, STEVEN BURNS, ALAN FLOREA, and IRVING GARBER,

Appellants.

Before:

MOORE and FEINBERG, Circuit Judges;
BONSAL,* *District Judge.*

* Of the Southern District of New York, sitting by designation.

Appeal by defendants from judgments of conviction of conspiracy under 18 U.S.C. § 371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. §§ 77 q(a) and 77x) and of substantive violations of said sections entered after a jury trial in the United States District Court for the Southern District of New York, Harold R. Tyler, *J.*

Affirmed.

DANIEL J. SULLIVAN, Asst. United States Attorney (Whitney North Seymour, Jr.,

United States Attorney for the Southern District of New York; William B. Gray, Arthur A. Munisteri, Asst. United States Attorneys, on the brief), *for Appellee.*

Jacob W. Friedman, New York, N. Y. (Slotnick & Narral, Arnold E. Wallach, New York, N. Y., on the brief), *for Appellant Kaufman.*

Geoffrey M. Kalmus, New York, N. Y. (Kramer, Lowenstein, Nessen & Kamin, New York, N. Y.; Maurice N. Nessen, Charlotte Fischman, on the brief), *for Appellant Burns.*

Jerome J. Londin, New York, N. Y. (Carro, Spanbock & Londin, New York, N. Y., on the brief), *for Appellant Florea.*

Burton S. Cooper, New York, N. Y. (Shatzkin and Cooper, New York, N. Y.; Edwin L. Smith, on the brief), *for Appellant Garber.*

✦

Bonsal, *District Judge:*

Paul M. Kaufman, Steven Burns, Alan Florea and Irving Garber appeal from judgments of conviction entered against them on July 29, 1969 after a seven-week trial before Judge Tyler and a jury. The indictment (68 Cr. 485) was filed on June 3, 1968 and charged ten defendants in seventeen counts. Five defendants, including the four appellants, went to trial, and twelve counts went to the jury. Count 1, the conspiracy count, charged a conspiracy under 18 U.S.C. § 371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. §§ 77q(a) and 77x). The eleven substantive counts charged violations of these sections in sending confirmations of stock transactions

through the mails. The substantive counts are also described as overt acts in the conspiracy counts as acts done pursuant to the alleged conspiracy. Defendant Seigenfeld was acquitted by the jury with respect to the conspiracy count, the only one in which he was charged.

The jury convicted all four appellants under the conspiracy count; Kaufman and Burns on counts 3, 5, 8 and 9, in which they alone were charged; and Kaufman on counts 10, 11, 12, 13, 15, 16 and 17, in which he alone was charged.[1] For the reasons hereinafter stated, we affirm the convictions of each of the appellants.

Statement of Facts

Daniel Kroll, who died in August 1963, was the former president of Donbar Development Corporation (Donbar), which was engaged in the development, building and sale of interracial residential real estate on Long Island and in New Jersey. In January 1963, Kroll lost a proxy fight and was removed from the presidency of Donbar. He owned 82,000 unregistered shares of Donbar, a thinly traded stock selling in the over-the-counter market. A part of his holdings was tied up in a voting trust agreement.

In March 1963, with the assistance of appellant Kauf-

[1] Defendants were sentenced on July 29, 1969. Kaufman received concurrent nine-month sentences and a $2,000 fine on each count, but execution of the prison term was suspended on all except the first count. Burns received concurrent four-month sentences and a fine of $1,000 on each of the Counts 1, 3, 5, 8 and 9, but execution of the prison term was suspended on all but the first count. Florea received a sentence of four months imprisonment on Count 1, the execution of which was suspended, and a fine of $1,500. Garber received a sentence of three months imprisonment and a fine of $1,000 on Count 1.

man's law firm, Kroll obtained a no action letter from the S.E.C., and later in the month began selling some of his available Donbar stock. He encountered difficulties and, in early April, asked for assistance from Mark Binstein, the chief Government witness, who, at the time, maintained an office under the name of National Market Relations, Inc. and employed a Mrs. Eveline Gold on a part-time basis.

Kroll, Binstein and appellant Garber, the owner and operator of an unincorporated over-the-counter securities firm, called Nassau Securities Service, worked out a scheme to sell some 40,000 shares of Kroll's Donbar stock to the public. The scheme involved the paying of cash bribes to salesmen, selective buying to raise and support the market price of the stock, controlled selling so as not to depress the market, and the "squeezing" of short sellers. Appellant Garber was to cause enough Donbar shares to be bought to raise its price from 3-3½, to 4¼-4¾. Appellant Kaufman joined the scheme and brought in S. C. Burns & Co., Inc. and its president, the appellant Steven Burns, to participate in the distribution of the Kroll stock. Cash payments were made to Burns in return for retail sales by his firm, and the payments were escrowed with Kaufman until the Burns sales had been completed. Kaufman introduced the principals of Harris, Clare & Co., clients of his law firm, to Kroll, and told them they would receive $1.00 cash per share for Kroll stock they sold to customers. Appellant Florea agreed to find brokers to take Donbar stock, and was to receive from Binstein 25¢ in cash for each share so taken. One of these brokers was Seigenfeld, who was acquitted of conspiracy by the jury. Florea was paid in cash by Binstein for his services.

The scheme was carried out during May and June, 1963. The selling of Kroll's available Donbar stock was substantially completed in June, 1963. His shares were sold at prices ranging from $3.00 to $4.00 per share, and thereafter the price dropped to $1.50 to $2.00 per share. None of the retail purchasers who bought Donbar stock were told of the cash payoffs which were made to salesmen to stimulate their recommendations or that the price of the stock was being rigged while they were buying.

Sufficiency of the Evidence

The jury having found each of the appellants guilty, the evidence must be viewed most favorably to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Bowles*, —— F.2d ——, Docket Nos. 34335-6, 34497 (2d Cir., June 16, 1970), Slip Op. 3311, 3312; *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, —— U.S. —— (38 U.S.L.W. 3388, April 6, 1970); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). So viewed, the evidence established an unlawful conspiracy to sell Kroll's Donbar stock through the use of fraudulent and manipulative devices, and the participation of each of the appellants in the conspiracy.

The Government was not required, as appellants contend, to prove that each appellant was involved in all phases of the conspiracy. It was sufficient for the Government to prove that each of them knowingly joined the conspiracy to sell the stock by the use of fraudulent and manipulative devices. *United States* v. *Dardi*, 330 F.2d 316, 327 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964) and cases cited therein.

The evidence establishes that Garber aided Binstein and Kroll in setting up the scheme and undertook to supervise the distribution of the Donbar stock. Mrs. Gold and Binstein went to Garber's office to obtain information concerning the market operations. Kaufman, as Binstein and Kroll's attorney, actively participated in the conspiracy and acted as escrow agent for the cash payments to be made to appellant Burns and received cash from Binstein for that purpose. Burns does not deny that he was to receive payments from Kaufman, but he contends that he did not know of the market rigging aspect—"one prong of the prosecution's two-pronged scheme and conspiracy theory." As stated above, it is immaterial that he may not have known of all of the facets of the conspiracy.

Appellant Florea strenuously contends that he was not a member of the conspiracy, and we consider the evidence as to his participation in more detail.

Florea asserts that there is no evidence of his agreement to effect fraudulent sales of Donbar stock to the public, and that his participation was limited to the "buy" function. Binstein testified that following his first meeting with Kroll, he met with Florea and told him in detail what was contemplated—"that Mr. Kroll would pay $100 per 100 shares for anybody who wanted to participate in the corner, and in the run-up of the stock of Donbar Development Corporation." Binstein testified that,

> "The brokers were told to buy the stock, to put in for clients or trading accounts or anything, but to be put away, not to be sold immediately thereafter, immediately after buying it,"

and that this was in substance what he told Florea.

Binstein testified that Florea visited his office on a number of occasions in May-June, 1963 in connection with the sale of Donbar stock. He testified that Florea "was coming to both collect money for himself and the people he had brought into the Donbar situation, and on a couple of occasions just to come to check [Binstein's daily progress report] . . . to see what buying was done by whom, to make sure he received what he thought he was entitled to." Binstein also testified that Florea had introduced him to Seigenfeld and Dietz Securities. Binstein testified that Florea demanded compensation for his services with respect to Harris Clare and Dietz Securities and that he made a number of cash payments to Florea in connection with Dietz and Harris Clare. Mrs. Gold testified concerning discussions between Florea and Binstein in Binstein's office that,

> "He [Florea] was discussing the amount of money that Binstein owed him for putting certain buying into Donbar although I never actually saw him get paid,"

and that

> "Mr. Florea was claiming compensation for Dietz buying."

Florea testified that he had never heard of Kroll and that he first heard of the Donbar company in 1967, in the U. S. Attorney's office. Florea conceded only that he knew Binstein, as they had been at West Point together. He testified that he never introduced any brokers to Binstein for the purposes of buying or selling Donbar, and he denied receiving any payments from Binstein in con-

nection with Donbar stock. On cross-examination, Florea testified that he occasionally went to Binstein's office, where he saw Binstein and Mrs. Gold. Florea conceded that he could have heard about Donbar in 1963, that he may have told the U. S. Attorney in 1968 that Donbar was represented by Binstein in a public relations capacity, and that he may have heard Kroll's name mentioned in Binstein's office. He also testified that he knew Kaufman and may have seen Burns socially.

The evidence with respect to Florea presented a question of credibility for the finder of fact—whether to believe Binstein or to believe Florea. The jury deliberated two days and considered the evidence with great care, which is demonstrated by the fact that they acquitted Seigenfeld. The evidence establishing that Florea knowingly participated in the conspiracy, knowing both about the fraudulent sale of the Kroll stock to the public as well as the market support operation, was sufficient if the jury believed it—and they did.

Therefore, the evidence establishes that each of the appellants was a member of the conspiracy charged in the first count. Florea contends that the proof fails to show that he knew that the mails would be used in carrying out the conspiracy. However, the proof was sufficient to enable the jury to find that Florea knew that the mails would be used in connection with the distribution of Kroll's Donbar stock. Indeed, as a "registered representative," Florea must have known that the mailing of confirmations was routine in the sale of securities on the over-the-counter market.

Moreover, the proof showed that the confirmations which were the subjects of the overt acts in the conspiracy count and of the substantive counts, were in fact mailed, and that they were mailed in furtherance of the conspiracy. Therefore, the jury having found Kaufman and Burns guilty under the conspiracy count, could find them guilty under the substantive counts as well. The jury was not required to find that Kaufman or Burns knew or should have foreseen that the mails would be used in sending the confirmations listed in the substantive counts. The mails are included in the statute as a ground for Federal jurisdiction. The recent decision of *United States* v. *Blassingame*, ——F.2d ——, Docket No. 33988 (2d Cir., June 1, 1970) overruling *United States* v. *Houlihan*, 332 F.2d 8 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964) holds that the essence of the crime is the fraudulent scheme itself, and that there is no reason why guilt under the statute should hinge upon knowledge that interstate communication or the mails were used. Since Kaufman and Burns were members of the conspiracy and the mailings were overt acts in furtherance of the conspiracy, they were properly found guilty of the substantive counts by reason of the fraudulent scheme in which they knowingly participated.

We find, therefore, that the evidence was sufficient to support the jury's conviction of the appellants on all counts.

Government Exhibit 1

Government Exhibit 1, which was received in evidence over objection, was Binstein's daily progress record of the sales of Kroll's Donbar stock and the cash payoffs. The

record started on May 16 and continued to June 6, 1963. It contains a number of corrections, side notes, and computations. Appellants Burns, Florea, and Garber urge that Government Exhibit 1 was not a business record and should not have been received in evidence. However, Exhibit 1 was a contemporaneous record kept in the ordinary course of business and was properly received. *United States* v. *Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 894 (1964). It was a record kept in furtherance of the conspiracy. The items were documented by other brokerage records and corroborated by testimony at the trial. It was clearly a business record kept for a business purpose. Therefore, Government Exhibit 1 was properly admitted, and it was for the jury to determine the weight to be given it.

Government Exhibits 401-406—The Braun Schedules

A more difficult issue is presented by the Braun schedules. Braun was Kroll's accountant. He testified that he prepared these schedules on or immediately after June 11, 1963, following a meeting which he had with Kroll and Binstein, and that the schedules set forth information contained in Government Exhibit 1, which they furnished him, supplemented by information given to him by Kroll and Binstein at the June 11 meeting. There was evidence to indicate that the purpose of these schedules was to serve as an accounting between Kroll and Binstein, and perhaps to be used in a tax fraud in which they alone were engaged. The Braun schedules were not offered by the Government during the Government's direct case. Braun was called as a witness by appellant Florea, apparently in an attempt to

contradict Binstein's testimony that Braun had laid out the format of Government Exhibit 1. In cross-examining Braun, the Government offered the Braun schedules to corroborate Binstein's testimony. The Government made effective use of the Braun schedules at the trial and in the course of its summation.

Appellants raised timely objections to the introduction of the Braun schedules—which objections were overruled. On this appeal, they contend that the Braun schedules should have been excluded under the hearsay rule and that the trial judge's failure to do so seriously prejudiced their rights to a fair trial. Appellants assert that the conspiracy had terminated before June 11 and that, therefore, the Braun schedules were not and could not have been prepared in furtherance of the conspiracy, and were therefore mere prejudicial hearsay as to them.

However, the evidence indicates that the conspiracy had not come to an end when the Braun schedules were prepared. The settlement dates on various sales of the stock did not occur until after June 11, and other activities in connection with the distribution of the stock were not finally concluded until June 24, 1963. We note that much of the information contained in the Braun schedules had been previously set forth in Government Exhibit 1. Moreover, even if the Braun schedules were in the nature of an accounting between the primary conspirators, Binstein and Kroll, they also revealed the status of the conspiracy with respect to the appellants. As such, they were properly received as a business record made before the final termination of the conspiracy, setting forth the interests of those

involved. *United States* v. *Cohen*, 384 F.2d 699, 701 (2d Cir. 1967); *United States* v. *Hickey*, 360 F.2d 127, 143-44 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States* v. *Re*, *supra*. The appellants were given adequate opportunity to cross-examine Braun with respect to the schedules and to argue in their summations the weight to be given them by the jury.

Other Contentions

The remaining contentions of the appellants do not require extended discussion.

Appellants Florea, Kaufman, and Garber contend that their cross-examinations of the Government witnesses were unduly restricted by the trial judge, but we find these contentions to be without merit. The trial judge in a lengthy trial must be afforded reasonable discretion to limit cross-examination, and we do not find that the trial judge abused this discretion, *United States* v. *Crosby*, 294 F.2d 928, 944 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962). Appellants complain that they were not allowed to cross-examine Binstein regarding his relationship with a professional basketball team or whether he had informed his associates in that venture that in return for testifying "he was not going to go a jail sentence." The record reveals that this issue came up out of the hearing of the jury when Seigenfeld's attorney engaged in a lengthy colloquy with the trial judge. At the end of it, the trial judge allowed Seigenfeld's attorney to ask the questions in another form, but he didn't follow it up and neither did the attorneys for the appellants. Nor was it error for the trial judge to preclude inquiry as to Binstein's address. *United States* v.

Persico, —— F.2d ——, Docket Nos. 34016, 34119, 34235, 34344 (2d Cir., April 15, 1970). In view of the prior relationship between Binstein and appellants, it is hard to see why this was prejudicial, nor did any of the appellants advance sufficient reason to show that it was prejudicial.

Kaufman and Florea contend that the trial judge erred in allowing testimony by Mrs. Gold concerning a prior illegal stock distribution in which Florea and Binstein, and perhaps Kaufman, were involved. However, except for statements made by Mrs. Gold outside of the hearing of the jury, her testimony does not contain any references to prior illegal acts in which the appellants were involved.

Appellant Garber, who appeared *pro se* throughout the trial, contends that he was improperly restrained by the trial judge and that these restraints violated his constitutional right not to testify. Garber's argument is totally without merit. The record shows that from time to time he made statements directly to the court and jury and was properly restrained by the trial judge. Indeed, to the extent that some of his statements might be construed as testimony he may have waived his right to refuse to testify. *See, United States* v. *Lacob*, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, —— U.S. ——, 38 L.W. 3287 (1970); *Redfield* v. *United States*, 315 F.2d 76, 80 (9th Cir.), *cert denied*, 369 U.S. 803 (1963). During the course of Garber's rambling cross-examination of Binstein, the trial judge remarked, "Don't ask him that kind of thing. Ask him questions having to do with what he has testified to on direct examination by Government counsel. You will have a chance later to tell your side of the story, if you care to." Garber has made no showing that the trial judge's remark was prejudicial error. *See, United States ex rel.*

Miller v. *Follette*, 397 F.2d 363, 367 (2d Cir. 1968), *cert. denied*, 393 U.S. 1039 (1969). Throughout the trial, the trial judge sought to protect Garber's constitutional rights, and, indeed, he helped him on various occasions to frame proper questions.

Appellant Kaufman contends that the trial judge erred in striking the testimony of New York Supreme Court Justice Louis B. Heller, his principal character witness. However, Justice Heller was unable to testify as to Kaufman's reputation in the community. He testified only that he knew the appellant and his family, had seen him socially, and that the appellant made "a very good impression" on him. He did not testify as to the community in which Kaufman lived or the circles in which he moved, and hence could not speak with authority as to his reputation in the community. *See*, *Michelson* v. *United States*, 335 U.S. 469, 478 (1948), 3 Wigmore, Evidence, § 691 at 17 (3d ed. 1940).

Appellant Garber complains that his Fifth Amendment privilege against self incrimination was denied him when the District Court ordered the production of his noncorporate business records pursuant to a Grand Jury subpoena. He had discontinued his business prior to the issuance of the subpoena. As a registered broker-dealer, Garber was required by S.E.C. regulations to make and keep the records in question so that the same would be available for inspection and examination, and the protection of the Fifth Amendment does not apply. *Shapiro* v. *United States*, 337 U.S. 1, 32 (1948); *see*, *United States* v. *Pine Valley Poultry Distributors Corp.*, 187 F. Supp. 455, 457 (S.D.N.Y. 1960).

Appellant Burns contends that he was prejudiced by the trial judge's refusal to allow him to go to trial with defendant Seigenfeld's former lawyer. Seigenfeld's lawyer moved to disqualify his predecessor from representing Burns at the trial or, in the alternative, for a severance of Seigenfeld. The lawyer opposed the motion and later sought a writ of mandamus directing Judge Tyler to permit him to continue as Burns' attorney—which was denied by the Court of Appeals (*Burns* v. *Tyler*, Docket No. 33376, March 21, 1969). The trial judge was well within his discretion in directing Burns to obtain another lawyer in view of the possible conflict of interest between Burns and Seigenfeld. *See, Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *T. C. Theater Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953). Indeed, the wisdom of this exercise of discretion was demonstrated by the acquittal of Seigenfeld and the conviction of Burns.

Burns also contends that since he was acting as principal and not as broker in the sale of the Donbar stock, he had no duty to disclose to customers the cash payments which he was receiving. (*See, United States* v. *Bilotti*, 380 F.2d 649, 657 n. 17 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States* v. *Hayutin*, 398 F.2d 944, 949 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968). However, the receipt of these cash payments and the failure to disclose their receipt to customers was circumstantial evidence to be considered by the jury in determining whether or not Burns was a member of the conspiracy to sell the Donbar stock through the use of manipulative and unlawful devices.

Garber claims that his participation in the conspiracy terminated on June 3, 1963, on the ground that after that date he no longer bought Donbar stock but, on the contrary, was selling it—which he says is "evidence that the conspiracy had failed. *See, Fishwick v. United States*, 329 U.S. 211, 91 L.Ed. 196, 200." He therefore contends that the statute of limitations had run as to him. However, there is no evidence from which the jury could have concluded that Garber affirmatively withdrew from the conspiracy on or before June 3, and he therefore remained tied into the conspiracy with respect to overt acts committed by other members of the conspiracy after that date.[2] Moreover, the evidence showed that Garber's activities in supervising the distribution of the Donbar stock continued after June 3.

The remaining allegations of error require no comment, and the conviction of the appellants is affirmed.

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[2] The trial judge had originally charged the jury that they must find at least one overt act was committed prior to June 3. After this was brought to his attention, he corrected his charge and instructed the jury that "at least one of the overt acts [was] allegedly committed on or after June 3, 1963." The trial judge told the jury that June 3, 1963 was the cutoff date for the statute of limitations and that it was for this reason that the jury must find that at least one of the overt acts took place on or after that date.

Judgment of Conviction

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 68 Cr. 485

UNITED STATES OF AMERICA

—v.—

STEVEN BURNS

On this 29th day of July, 1969 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly, in the offer and sale of securities, using and causing to be used means and instruments of transportation and communication in interstate and foreign commerce and the mails in employing devices, schemes and artifices to defraud, in obtaining money and property by means of untrue statements of material facts and the engagement of transactions which would operate and did operate as a fraud and deceit upon purchasers of securities. (Title 15, U.S. Code, Sections 77q(a) and 77x; Title 18, U.S. Code, Section 2); and conspiring so to do. (Title 18, U.S. Code, Section 371) as charged in counts 1, 3, 5, 8 and 9 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

Judgment of Conviction

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) MONTHS on each of counts 1, 3, 5, 8 and 9 to run concurrently with each other. Execution of prison sentence on counts 3, 5, 8, and 9 is suspended and the defendant is placed on probation for a period of TWO (2) YEARS, to commence upon the expiration of service of prison sentence imposed on count 1, and subject to the standing probation order of this Court.

The defendant is FINED $1,000.00 on each of counts 1, 3, 5, 8 and 9. Fines totalling $5,000.00 are to be paid within 10 days or the defendant is to stand committed until the fines are paid or he is otherwise discharged according to law.

The defendant is continued on his present bail until he posts bail of $1,000.00 personal recognizance bond pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ H. R. TYLER, JR.
United States District Judge.

/s/ JOHN LIVINGSTON
Clerk.

U. S. DISTRICT COURT
FILED
JUL 29 1969
S. D. OF N. Y.

Order Denying Petition

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

33376

STEVEN C. BURNS,

Petitioner,

—v.—

HONORABLE HAROLD R. TYLER, JR., UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

A petition for a writ of mandamus and/or prohibition having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ LEONARD P. MOORE
Leonard P. Moore, USCJ

/s/ WILFRED FEINBERG
Wilfred Feinberg, USCJ

/s/ EDWARD C. McLEAN
Edward C. McLean, USDJ

March 21, 1969.

Order Denying Motion

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 16th day of April, one thousand nine hundred and 69.

STEVEN C. BURNS,

Petitioner,

—v.—

HONORABLE HAROLD R. TYLER, JR., UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

ORDER

On motion of counsel for petitioner to stay issuance of the mandate for a period of 90 days pending application to the Supreme Court of the United States for a writ of certiorari.

It is hereby ordered that the motion is DENIED.

/s/ LEONARD P. MOORE
Leonard P. Moore, USCJ

/s/ WILFRED FEINBERG
Wilfred Feinberg, USCJ

/s/ EDWARD C. McLEAN
Edward C. McLean, USDJ

April 16, 1969

APPENDIX B

Constitution of the United States

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Securities Act of 1933 § 17(a), 15 U.S.C. 77q(a)

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or

instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Securities Act of 1933, § 24, 15 U.S.C. 77x

PENALTIES

SEC. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

Federal Criminal Code, 18 U.S.C. § 371

CONSPIRACY TO COMMIT OFFENSE OR DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Federal Judicial Code, 28 U.S.C. § 1732(a)

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

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SUPREME COURT

Nos. 661, 674, 676 and 711

In the Supreme Court of the United States

SUPREME COURT, U.S.
FILED
NOV 1 1971
E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1971

IRVING GARBER, PETITIONER

v.

UNITED STATES OF AMERICA

ALAN FLORES, PETITIONER

v.

UNITED STATES OF AMERICA

PAUL M. KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

STEVEN G. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD
Solicitor General

WILL WILSON
Assistant Attorney General

ROBERT A. BAILEY
EDWARD KITCH
Attorneys

Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	6
Conclusion	21

CITATIONS

Cases:

Albertson v. *SACB*, 382 U.S. 70	14
Blumenthal v. *United States*, 332 U.S. 539	10
Boyd v. *United States*, 271 U.S. 104	18
Chugach Elec. Ass'n. v. *United States D.C. for District of Alaska*, 370 F. 2d 441, certiorari denied *sub nom. Roderick* v. *Chugach Elec. Ass'n.*, 389 U.S. 820	21
Colonnade Catering Corp. v. *United States*, 397 U.S. 72	15
Glasser v. *United States*, 315 U.S. 60	14
Grillo v. *United States*, 336 F. 2d 211, certiorari denied *sub nom. Gorin* v. *United States*, 379 U.S. 971	16
Grunewald v. *United States*, 353 U.S. 391	7
Haynes v. *United States*, 390 U.S. 85	15
Johnson v. *United States*, 325 F. 2d 709	16
Lutwak v. *United States*, 344 U.S. 604	14
Marchetti v. *United States*, 390 U.S. 39	14, 15
Michelson v. *United States*, 335 U.S. 469	13
Pereira v. *United States*, 347 U.S. 1	8

408-436—70——1

Cases—Continued

	Page
Pritchard v. *United States*, 386 F. 2d 760, certiorari denied *sub nom. Borchelt* v. *United States*, 390 U.S. 1004	16
Shapiro v. *United States*, 335 U.S. 1	15
Smith v. *Illinois*, 390 U.S. 129	12
United States v. *Brickey*, 426 F. 2d 680	8
United States v. *Cohen*, 384 F. 2d 699	16
United States v. *Hamilton*, 420 F. 1096	18
United States v. *Hickey*, 360 F. 2d 127, certiorari denied, 385 U.S. 928	16
United States v. *Kelly*, 349 F. 2d 720, certiorari denied, 384 U.S. 947	17
United States v. *Lawler*, 413 F. 2d 622, certiorari denied, 396 U.S. 1046	12
United States v. *Lee*, 413 F. 2d 910, certiorari denied, 396 U.S. 1022	12
United States v. *Re*, 336 F. 2d 306, certiorari denied, 379 U.S. 904	16
United States v. *Trafficante*, 328 F. 2d 117	21
Statutes and Regulation:	
15 U.S.C. 77q(a) and 77x	3
18 U.S.C. 371	3
28 U.S.C. 1732	16
17 C.F.R. 240.17a-4(a)	15

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 567

IRVING GARBER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 574

ALAN FLOREA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 576

PAUL M. KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 719

STEVEN C. BURNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Garber Pet., No. 567, App. A1–A15) is reported at 429 F. 2d 240.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1970. Mr. Justice Harlan in the case of Burns extended the time for filing a petition for a writ of certiorari to September 19, 1970, and on that date his petition was filed. The other petitioners filed their petitions on August 20, 1970 (Garber) and August 21, 1970 (Florea and Kaufman). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The following questions are presented in these four petitions by the defendants at a common trial for conspiracy and securities fraud:

1. Whether the evidence supports the verdict (Florea, Kaufman, Burns).

2. Whether certain evidentiary rulings, including limitations on cross-examination were proper (Florea, Kaufman, Burns).

3. Whether certain documentary evidence, including the required business records of a broker, a daily account of stock distribution, and analyses of the daily account made by an accountant, was properly received (Garber, Florea, Burns).

4. Whether the court's instructions in certain particulars were accurate and fair (Florea, Kaufman).

5. Whether it was proper, at the request of a co-defendant, months before trial, to disqualify Burns' retained counsel, whose firm had previously represented a co-defendant in the criminal matter that was the subject of the instant trial (Burns).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, each petitioner was convicted of conspiracy to violate the anti-fraud provisions of the Securities Act of 1933, and petitioners Kaufman and Burns were also convicted of the substantive offenses of sending confirmations of fraudulent stock transactions through the mail, in violation of 18 U.S.C. 371 and 15 U.S.C. 77q(a) and 77x.[1] On July 29, 1969, petitioner Garber was sentenced to three months' imprisonment and fined $1,000; petitioner Florea was given a suspended sentence of four months, placed on probation for two years and fined $1,500; petitioner Kaufman was sentenced to nine months' imprisonment on each of twelve counts (to be served concurrently, with the imprisonment on all but the first count suspended), placed on probation for two years after release from imprisonment, and fined $2,000 on each count, for a total of $24,000; and petitioner Burns was sentenced to four months'

[1] A fifth defendant (Seigenfeld) who stood trial with petitioners, was acquitted. Initially, ten defendants were named in the indictment but some pleaded guilty before trial or were otherwise granted a severance from the five tried in the present case. Of the seventeen counts, twelve went to the jury.

imprisonment on each of five counts (to be served concurrently, with the imprisonment on all but the first count suspended), placed on probation for two years after release from imprisonment, and fined $1,000 on each count for a total of $5,000.

The evidence showed that in May 1963, Daniel Kroll, a past president of Donbar Development Corporation, owned a large block of unregistered stock in that corporation which he was unable to sell at the then current over-the-counter market price (App. 105–106).[1] He decided to deposit a significant portion of his stock with one broker (Lee) with instructions to sell at $4 per share or higher, approximately $1 above the then current market price, and to use other brokers to create a market for the shares at the same price (App. 116–117). Kroll's method of creating a market for Donbar shares included support for the price, so that it would not drop below $3.50 per share. He thereafter had various nominees of his, acting through petitioner Garber's brokerage firm (Nassau Securities), buy Donbar stock at prices over $3.50 (App. 127–128).

Kroll furnished the money for these support purchases and promised to protect Garber and his nominees against loss (App. 117–118, 127, 129, 587). Having thus raised the market price by approximately $1 per share, Kroll agreed to pay $1 per share to other brokers, such as petitioner Burns, to buy shares from

[1] "App." refers to the eleven volume appendix of petitioners Kaufman and Burns of the proceedings before the district court. We are lodging this appendix with the Clerk of this Court.

the supply he owned (App. 110, 241, 251–252, 1748, 1939, 1983). The brokers would buy the shares either for their own accounts (App. 4094, 4147), hoping for a profit in addition to the $1 per share bonus for buying, or for the accounts of customers whom they could persuade to take the stock. The customers were not told of the temporary price support nor of the extra cash compensation that Kroll was furnishing (*e.g.* App. 1736, 1755, 1839, 1950, 1962, 1971–1972).

Petitioner Florea was a registered representative with a brokerage company (Richter); his function in the Donbar enterprise was as a "finder" of brokers, whom he would introduce to Kroll and Kroll's associate, one Binstein,[1] with a view to their participation in the contemplated "corner" of Donbar stock (App. 130–133). For this service, Florea demanded and received compensation based on Binstein's record (Govt. Ex. 1) of the number of Donbar shares these participating brokers bought (App. 155–156, 164, 192–193, 481, 483, 487, 498, 568, 1557–1561).

Important to the success of the selling of Kroll's block of shares was a time limitation on the reselling of Donbar shares imposed on the participating brokers to prevent the market from collapsing (App. 150). The enforcement of this restriction was the responsibility of petitioner Garber (App. 584, 587, 1553), but some prompt reselling nevertheless ensued. As a result,

[1] Binstein, a government witness at trial, was not indicted for his part in the Donbar distribution, but was awaiting sentence on another stock fraud charge to which he had pleaded guilty (App. 103).

Kroll went to his attorney, petitioner Kaufman, for help (App. 245). Kaufman introduced Kroll to broker clients of his law firm, such as petitioner Burns, who were agreeable to participation in the disposition of the Donbar stock (App. 245–246, 1745). Some of these brokers preferred to receive their secret $1 per share compensation direct from Kroll or Binstein (App. 1834), but petitioner Burns had petitioner Kaufman[4] act as the escrow agent for the multi-thousand dollar payments paid to Burns for his work (App. 247–248, 735–737, 858–859, 1578).

In buying stock for the accounts of their customers in Donbar Development, the brokers sent confirmations of the purchases by mail (*e.g.* App. 1854–1855, 1859, 1861, 1951, 1962, 1972, 1992).

The activity in Donbar stock lasted approximately three weeks, ending the first week of June 1963 (App. 438, 563).[5] By the third week of June, the price of the Donbar shares had fallen from $4.50 a share to a price range of $1.50 to $2.00 (App. 278, 890).

ARGUMENT

1. Florea, Kaufman, and Burns each assert that, as to himself, the evidence was insufficient to support the verdict of guilty.

a. Florea:

Petitioner Florea contends that if he was guilty of anything, it was only of finding brokers who would

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[4] Kaufman sought compensation from Kroll by boosting the legal fee he charged Kroll for his work in an unrelated matter (App. 280–285).

[5] Kroll died in August 1963 (App. 285).

buy Donbar stock for their own profit and there was no evidence to show that he was aware of a conspiracy to sell the stock fraudulently to the public or knew that the mails would be used in furtherance of the fraud (Florea Pet. 5, 11–12, 13–15). The record, however, belies these contentions. When Florea was told of the proposed scheme to raise the Donbar price and agreed to join it, it was explained to him by Binstein that brokers were to buy the shares for their "clients" or their own trading accounts, with the stock so purchased "to be put away, not to be sold immediately thereafter, immediately after buying" (App. 149). Florea then told a fellow broker, co-defendant Seigenfeld, that money could be made in Donbar stock "for customers" as well as by a broker trading for his own account (App. 4179). Thus, it is clear that Florea knew that the public would be involved in advancing the price of the stock. As for the claimed ignorance of the use of the mails, the jury could permissibly infer from the fact that, as an experienced registered representative in the securities business (App.

[6] Florea also claims that his prosecution was barred by the running of the five-year statute of limitations. He states that he entered into the agreement in May, 1963 and his efforts terminated then, but he was not indicted until June 3, 1968. Whether he continued as a member of the conspiracy until June 3, 1963 and thereafter was a factual question submitted to the jury (App. 4708–4709, 4712). The evidence showed that sales were made to the public by his fellow conspirators as late as June 6, 1963 (App. 2195, 3449). Since the offense was a continuing one, designed to take stock out of circulation for a period of time after the last sale, the statute had not run by June 3, 1968. See *Grunewald* v. *United States*, 353 U.S. 391.

3225, 3237). Floren knew that brokers customarily mailed confirmations of purchases to their customers and would do so in connection with the Dunbar scheme. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Bridges*, 326 F. 2d 680, 684 (C.A. 8).

b. Kaufman:

Petitioner Kaufman contends (Kaufman Pet. 4–13) that the evidence was insufficient to convict him of either the conspiracy charge or the substantive counts of aiding and abetting the stock brokers in perpetrating frauds on their customers. As stated above, *supra*, pp. 5–6), however, when petitioner Garber proved unable to control his fellow brokers, Kroll sought and obtained the help of his attorney, Kaufman, who was experienced in the securities regulation field and had many brokers-dealer clients (App. 1326, 2879, 3276). Binstein testified as to Kaufman's efforts to introduce Kroll to various brokers and as to Kaufman's role as escrow agent for Burns' secret payments. Other brokers also testified that they first heard of the plan for disposing of Dunbar stock from Kaufman, and that he also offered to act as escrow agent for their secret payments from Kroll (App. 1394, 1713, 1718, 1768, 1831). From these facts, the jury was warranted in finding that Kaufman both participated in the conspiracy and aided and abetted Kroll and others.

Kaufman also urges (Pet. 16) that his convictions under the conspiracy and substantive counts should be mutually exclusive. It is, however, settled that aiding and abetting and conspiracy involve distinct elements and are distinct offenses. *Pereira* v. *United States*, 347 U.S. 1, 11–12.

Kaufman also contends (Kaufman Pet. 13–14) that the mailing of confirmation slips to customers who purchased Donbar stock did not constitute a use of the mails in furtherance of a fraudulent scheme, an element required for conviction under the instructions given to the jury.

Confirmation slips, however, are not simply courtesy notices. Before stock is delivered to a buyer, the confirmation notice must be sent out to enable the buyer to settle his account by the date indicated. Thus, confirmations are in effect bills calling for payments of the purchase prices indicated on the slips (see App. 1265–1266, 1311–1312, 1320, 1563, 2118, 3049, 4480). The jury was clearly warranted in finding that use of the mails to send out the confirmations was in furtherance of the conspiracy.

c. Burns:

Burns, a stock broker, claims that he had no knowledge of the market rigging of the price of the Donbar shares (Burns Pet. 6) and that the evidence that he sold the shares without disclosing the receipt of the secret payments of $1 per share was insufficient (Burns Pet. 7, 10, 11). Binstein testified, however, that after Kaufman had agreed to find brokers for the Donbar distribution, Kaufman named Burns as a broker with whom he had a "close relationship" and who could be depended upon to sell all the remaining Donbar shares (App. 245). Petitioner Burns later confirmed this claim of "retailing power" in a conversation with Binstein, when Binstein called on Burns to confirm Kaufman's arrangements (App.

247). Burns insisted at this time that his bonus money be paid in advance to Kaufman (App. 247), and Binstein thereafter on one occasion gave Kaufman $4,000 for Burns (App. 248). Halperin, an assistant of Binstein, also delivered an envelope with cash to Kaufman (App. 1064). This evidence of Burns' guilt was augmented by an accidental meeting he had with Binstein in 1967 while the Donbar distribution was under investigation during which Burns told Binstein that he had nothing to worry about and warned: "If you know what's good for you, just keep your mouth shut" (App. 275–276). The evidence thus clearly supported the finding of Burns' complicity both as to the conspiracy and substantive offenses.

2. Petitioners Florea, Kaufman and Burns also contend that certain evidentiary rulings, including limitations on cross-examination were prejudicial as to them.

a. Florea:

Florea asserts (Florea Pet. 17–27) that he should have been permitted to interrogate Binstein and co-defendant Seigenfeld more fully. It is claimed that restrictions by the court prevented any inquiry as to why Binstein was not indicted in the instant case and whether he hoped to avoid punishment on another stock fraud charge, and precluded full examination of Binstein's current business interest in a profes-

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The jury was instructed that this statement was to be considered solely as evidence against Burns (App. 277).

It was, of course, not necessary to prove that petitioner was a member of the conspiracy from its inception. *Blumenthal v. United States*, 332 U.S. 539, 557.

sional basketball league franchise (Florea Pet. 18–21). Contrary to this contention, these matters were either brought out on cross-examination or concerned matters outside the issues at trial.[10] Binstein, for example, testified that his cooperation with the government was not based on any promise that he would not be indicted for the Donbar transactions (App. 682); he stated that he hoped he would not be sentenced to imprisonment or would receive a suspended sentence on an unrelated stock fraud charge to which he had pleaded guilty (App. 103, 397–398, 473). Binstein also testified that he had told league officials of his guilty plea to a felony (the stock fraud) and had been informed that he was not as a result barred by league rules from holding an interest in a franchise (App. 472). The defense had ample opportunity to show Binstein's past lies and evasions, his profit from the Donbar distribution, and to question other witnesses as to his reputation of being a "born cheat" (App. 344, 350, 430, 432, 444; 401, 757; 1558).

Seigenfeld's counsel at trial asked that his client and one Richter, both officers of a stock exchange firm for which Florea had worked, not be cross-examined as to administrative sanctions which had been imposed on them by stock exchange authorities, unless government counsel or counsel for other defendants first explained to the court at a side bar conference

[10] The profitability of a public offering of stock in the basketball franchise, completed after the verdicts were returned in the instant case (Florea Pet. 20–21), could not have been known weeks earlier when Binstein testified and at a time when the registration statement for such offering had not been filed.

Florea's claim that this restriction was error (Florea Pet. 23–27) is without merit as no counsel made an effort to inquire as to these administrative sanctions and the court had not forbidden such inquiries.

b. Kaufman:

The trial court sustained an objection to a question asking Binstein where he lived and where his children lived (App. 308–309). Petitioner Kaufman urges this as error. However, *Smith v. Illinois*, 390 U.S. 129, upon which he relies, requires reversal only where the lack of name and address of a witness denies a defendant an opportunity to cross-examine *effectively*. Where a defendant is not hampered in his cross-examination, no confrontation right is infringed. *United States v. Lawler*, 413 F. 2d 622, 627 (C.A. 7), certiorari denied, 396 U.S. 1046; *United States v. Lee*, 413 F. 2d 910, 915 (C.A. 7), certiorari denied, 396 U.S. 1022.

In the present case, Binstein testified as to his marriage and number of children and that he lived in New Jersey. He also testified as to his current occupation (App. 308–311). The court offered to hold a sidebar conference if counsel had any reason to want specific information as to the place of residence of Binstein; but no counsel sought such a conference (App. 309). At all events, counsel had no trouble "in identifying the witness with his environment" (Kaufman Pet. 17). He was shown to be a person of some prominence in professional basketball circles and counsel for a co-defendant was able to identify him

(App. 608–614).

Kaufman also urges that it was error to allow testimony showing that Florea had participated in another crime not covered by the indictment and to strike character evidence offered in Kaufman's behalf (Kaufman Pet. 19–20, 21–23). The witness, Mrs. Gold, did not implicate Florea in another crime as petitioner Kaufman asserts. She stated that as part of the Donbar distribution, Florea sought compensation from Binstein for the buying activities of a broker, Dietz[11] (App. 1561). Since this dealing with Dietz was part of the Donbar transaction and since Florea does not presently complain as to this evidence, petitioner Kaufman has no cause for complaint.

As to the other point, a New York jurist (Judge Heller) testified that he was not familiar with Kaufman's reputation among those who knew him (App. 2305). Since the jurist did not know of that reputation, his evidence was properly ruled inadmissible. See *Michelson* v. *United States*, 335 U.S. 469, 472.

c. Burns:

Petitioner Burns states that the court erred by admitting hearsay statements of alleged co-conspirators before establishing by independent evidence the existence of the conspiracy and Burns' participation therein (Burns Pet. 10, 16–18). As Binstein, the first witness, gave evidence which showed that Burns knew of the conspiracy and was a member of it (App. 247,

[11] Dietz was named as a co-conspirator in the indictment, but his case was severed because of his health (App. 20–22).

735, 858–859, 1960, 1970, 1971). Burns' testimony is simply that it was error to admit the portions of Binstein's testimony which preceded the testimony connecting Burns with the conspiracy. But as Binstein's testimony, which was given in chronological order, showed in its entirety that petitioner Burns was a member of the conspiracy (see *Glasser* v. *United States*, 315 U.S. 60, 74), it is plain that a timely foundation was laid for the admission of all of the co-conspirator declarations. See *Lutwak* v. *United States*, 344 U.S. 604, 607.

3. Petitioners Garber, Florea and Burns contend that certain items of documentary evidence were improperly received.

a. Garber:

Petitioner Garber contends that the compelled production of records of his company (Nassau Securities) before the grand jury violated his privilege against self-incrimination (Garber Pet. 3–9). He relies on *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, *Marchetti* v. *United States*, 390 U.S. 39, and similar cases, in which it was held that certain required information was violative of defendants' rights against self-incrimination. In those cases, however, the Court's rationale depended on the fact that the information was demanded of a group inherently suspect of criminal activities. By contrast, stock brokers are not as a group criminally suspect and the purpose of requiring them to record their transac-

tions[12] is to insure orderly business dealings and to promote commerce and collect transfer taxes. This Court has held that in these circumstances individuals may be required to produce their business records for use in a criminal proceeding. *Shapiro* v. *United States*, 335 U.S. 1;[13] see *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 76.

b. Florea and Burns:

Florea and Burns claim that Binstein's record (Government Exhibit 1) with its daily entries recording purchases, sales and prices of the Donbar stock owned by Kroll during the May-June 1963 operation, and the secret payments to the brokers (App. 120–127) should not have been received. They also urge that the analyses of that exhibit made by Kroll's accountant Braun[14] on or shortly after June 11, 1963 (Government Exhibits 401–406), were inadmissible because Braun used oral information from Kroll and Binstein to sup-

[12] Securities and Exchange regulations require retention of records of securities transactions for six years. 17 C.F.R. 240.-17a–4(a).

[13] *Shapiro* was expressly distinguished in *Marchetti*, *supra*, 390 U.S. at 56–57 and *Haynes* v. *United States*, 390 U.S. 85, 98–99.

[14] Braun was called as a defense witness to contradict Binstein's testimony (App. 120–121, 404) that Braun had "set up" the form that Binstein used (Govt. Ex. 1). Braun testified that he had not done so, that he first saw the form on June 11, 1963, and that he then prepared analyses of sales, purchases and advances of the Donbar transactions (App. 3394–3395, 3400). On cross-examination, Braun was questioned concerning these analyses and Government Exhibit 1.

plement the information contained in Government Exhibit 1 (Florea Pet. 28–36; Burns Pet. 8–10, 15–17).

Both Government Exhibit 1, made by Binstein, and the six analyses (Government Exhibits 401–406), made by accountant Braun were stated by each maker to be accurate records and to have been prepared contemporaneously with the events recorded or within a reasonable time thereafter (App. 120–121, 3446, 3481, 3487, 3497, 3752). Since they were business records designed to effect an accounting as to funds expended and proceeds received based on the Donbar stock distribution (see App. 3468, 3480, 3483), the indicia of reliability surrounding their making furnished a "circumstantial guarantee of trustworthiness" and rendered them admissible. See *United States* v. *Hickey*, 360 F. 2d 127, 143 (C.A. 7), certiorari denied, 385 U.S. 928; 28 U.S.C. 1732. Exclusion was not required on the grounds that the entries were based on oral reports received from others, that the transactions recorded were illegal, or that the records were intended to be confidential. *Grillo* v. *United States*, 336 F. 2d 211, 213 (C.A. 1), certiorari denied *sub nom. Gorin* v. *United States*, 379 U.S. 971; *United States* v. *Re*, 336 F. 2d 306, 312–313 (C.A. 2), certiorari denied, 379 U.S. 904; *United States* v. *Cohen*, 384 F. 2d 699, 701 (C.A. 2); *Pritchard* v. *United States*, 386 F. 2d 760, 768 (C.A. 8), certiorari denied *sub nom. Borchelt* v. *United States*, 390 U.S. 1004. Nor were the records of Binstein and Braun required to be complete or maintained in the most efficient manner to make them admissible. *Johnson* v. *United States*, 325 F. 2d 709, 711 (C.A. 1);

United States v. *Kelly*, 349 F. 2d 720, 774 (C.A. 2), certiorari denied, 384 U.S. 947.[15]

4. Petitioners Florea and Kaufman question the accuracy and fairness of certain portions of the court's instructions to the jury.

a. Florea:

The court initially instructed that the defendants were alleged to be members of a conspiracy to use the mails and other means of interstate commerce in an effort to defraud (App. 4720). Later, while instructing as to the substantive offenses charged, the court noted that, since the government was relying on the use of the mails, such use had to be found by the jury "even though the indictment" mentioned the use of other means of interstate commerce (App. 4758). Florea asserts that this instruction was insufficient to alert the jury to the requirement that, as to the conspiracy count, it had to find a use of the mails in an effort to defraud (Florea Pet. 13–15). But any doubt in this regard was allayed by the supplementary instruction to the jury, after the jury had

[15] At all events, these records were merely cumulative. Binstein testified he made payments to Florea after Florea had agreed to enlist willing brokers (App. 155). As to Burns, Binstein testified as to his conversation with him (App. 257); and that this record showed 4,000 share blocks of Donbar stock as bought by Burns (App. 253). In addition, Burns' cashier at his brokerage concern, without objection from Burns' counsel, authenticated his records relating to his purchases and sales of Donbar stock (App. 1717–1722), and various customers of Burns testified that they bought Donbar stock from him in June 1963, without being informed of the temporary price support being given to the stock nor the secret bonus money being given to their broker (*e.g.* App. 1959–1962, 1970–1972).

requested further instructions regarding the conspiracy count, that the government was "relying on the use of the mails only" (App. 4859).

Florea also questions the propriety of another instruction, stating that a supplementary instruction did not make it clear that the overt act which the jury had to find was committed on June 3, 1963, or thereafter (because of his statute of limitations defense at trial) was one which had to "be in furtherance of the conspiracy alleged" (Florea Pet. 16). The supplementary instruction did not use the word "furtherance" but did state that the jury had to find that at least one of the overt acts alleged by the government occurred or was committed on June 3, 1963 or thereafter (App. 4860). The jury had been previously informed that such acts must have been performed in furtherance of some object or purpose of the conspiracy charged (App. 4722). Since the supplementary instruction was focussed on the statute of limitation defense (App. 4859), it was not necessary to repeat the entire previous instruction dealing with overt acts. Moreover, a court's charge is to be read in its entirety. *Boyd* v. *United States*, 271 U.S. 104, 107; *United States* v. *Hamilton*, 420 F. 2d 1096 (C.A. 7). Accordingly, it is clear that petitioner Florea suffered no prejudice from the instructions given.

b. Kaufman:

Kaufman asserts that in answering two inquiries from the jury, the court erred by its "apparent affirmance" of his guilt (Kaufman Pet. 24–28). A read-

ing of the replies shows the contrary. During deliberations, the jury sent two notes to the court which indicated that it was troubled by petitioner Kaufman's relationship as an attorney with other conspirators. It asked to be informed if mere knowledge of a conspiracy would impose a duty to report the conspiracy, and whether such knowledge or the negotiating of a contract between conspirators would result in an attorney becoming a member of the conspiracy (App. 4870, 4902). The court instructed that the charges had nothing to do with a lawyer defendant hearing about a conspiracy and failing to report it; that the case involved a government contention, denied by Kaufman, that Kaufman was a knowing participant (App. 4874–4875). As for a lawyer negotiating a contract, the court instructed that only if the jury found that the lawyer knew a conspiracy existed and then negotiated a contract to "assist and further that conspiracy" would a lawyer "become a knowing and wilful member of the conspiracy" (App. 4904–4905). Clearly, the replies given were accurate and responsive. Petitioner's characterization of the replies as being "an unfair invitation, if not direction, to convict petitioner" (Kaufman Pet. 27) is completely unfounded.

5. Petitioner Burns asserts that he was harmed by a pretrial order which, to avoid a possible conflict of interest with co-defendant Seigenfeld, required him to retain counsel other than the counsel he had selected (Burns Pet. 12–14, 19–20). The evidence shows that during the 1967 investigation that led to the in-

dictment, Seigenfeld was represented by two attorneys, a Mr. Wolpin and a Mr. Certilman, members of two different law firms (App. 5189–5190). After the indictment was returned, Seigenfeld retained Mr. Wolpin exclusively. Subsequently, Burns retained Mr. Certilman's firm (Wofsey) to defend him (App. 5190).[16] Mr. Wolpin objected that such representation of Burns might result in the divulgence of confidences made by Seigenfeld to Mr. Certilman while Seigenfeld was a client of the Wofsey firm (App. 5190, 5192, 5195). Government counsel also urged that the Wofsey firm should withdraw from its representation of Burns, relying on Canon 37 of the Canons of Professional Ethics which forbids representation which may result in the disclosure of the confidences of a client (App. 5208). The Wofsey firm protested (App. 5209, 5211, 5234), but the court ordered it to withdraw. (App. 5212, 5215). Prior to the date of that order, Burns had retained a Mr. Brodsky to serve as trial counsel, with the Wofsey firm to supply "expertise in securities matters" (App. 5203, 5253).[17] After the order in January 1969, Mr. Brodsky became sole counsel and thereafter represented Burns at the trial which commenced on May 5, 1969 (App. 2a). It is not

[16] The firm had represented Burns in civil matters for some prior years (App. 5248, 5263).

[17] Contrary to petitioner's claim (Burns Pet. 13), none of the partners of the Wofsey firm who made affidavits (in support of a writ of mandamus to permit them to continue to represent Burns) claimed that they represented Burns during the investigation which led to the indictment or that after the indictment, they did "extensive preparation" work in his defense (see App. 5263, 5269).

known what Seigenfeld may have told his former counsel, but Seigenfeld's trial counsel obviously contemplated having Seigenfeld testify in his own behalf (which he did) and he professed to fear a hostile cross-examination of his client by Burns' counsel. In view of such possibility, the order of disqualification of the Wofsey firm was not error. See *United States* v. *Trafficante*, 328 F. 2d 117 (C.A. 5); *Chugach Elec. Ass'n.* v. *United States D.C. for District of Alaska*, 370 F. 2d 441 (C.A. 9), certiorari denied *sub nom. Roderick* v. *Chugach Elec. Ass'n.*, 389 U.S. 820. Nor does it appear that petitioner was harmed by such disqualification in view of the earlier retention of Mr. Brodsky to serve as the trial counsel.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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